ATTORNEY FOR APPELLANT:

KENNETH R. MARTIN
Goshen, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHAD E. STRONG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0602-CR-69
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0407-FA-125

September 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Chad E. Strong appeals his convictions and sentence for murder and class A felony neglect of a dependent. We affirm in part and remand.

Issues

We address three of Strong's four issues, which we restate as follows:

I. Whether he has preserved any claim of prosecutorial misconduct;

II. Whether the trial court abused its discretion in admitting autopsy photographs of the victim; and

III. Whether Strong's convictions violate Indiana double jeopardy principles.

Facts and Procedural History[1]

The facts most favorable to the verdict indicate that Strong lived in the basement of his parents' home in Goshen with his girlfriend, Dusty James, and her two children: three-year-old T.G. and her one-year-old brother I.G. James and Strong slept in a bed, and the children slept on the floor in sleeping bags. Around the first of July 2004, Strong accidentally stepped on T.G.'s stomach during the night. T.G. suffered pain in her stomach and vomited several days thereafter. On the night of July 12, however, T.G. was "fine" and was "eating, drinking fine, playing around." Tr. vol. III at 43. Strong worked the late shift that night, came home, drove James to work, and returned home at approximately 6:15 on the morning of July 13.

[1] We direct the court reporter to Indiana Appellate Rule 28(A), which states that "[t]he pages of the Transcript shall be numbered consecutively regardless of the number of volumes the Transcript requires" and that "[n]o more than two hundred fifty (250) pages shall be bound into any one volume."

At approximately 11:30 a.m., Strong brought T.G. upstairs and gave her a bath. He told his mother, Karolyn, that T.G. threw up and had vomit in her hair. T.G. told Karolyn that her stomach hurt and that she felt as if she was going to get sick. Karolyn asked Strong to take T.G. out of the room, and he took her back to the basement. At approximately 2:15 p.m., Strong brought an unconscious T.G. back upstairs and stood her on the floor of Karolyn's room. T.G. collapsed and hit her head on the bedpost. Karolyn told Strong to take T.G. to the hospital.

Strong called James's place of employment and left a message that something was wrong with T.G. and that he was coming to pick her up. At approximately 3:00 p.m., Strong arrived to pick James up. Strong told James to drive. James saw T.G. in her car seat, unconscious, and she did not appear to be sleeping. *Id*. at 48. As James drove to the hospital, Strong put T.G. on his lap and attempted to perform CPR. He told James that T.G. "just passed out" and "hit her head on the bed frame" and that he was "going to go to jail." *Id*. at 49.

When they arrived at the hospital. T.G. was not breathing and had no pulse. She was "very cool to the touch, her skin was very pale, [and] she was very limp and lifeless" when she was carried to the trauma room. Tr. vol. II. at 37. The only information that either Strong or James relayed to the medical staff was that T.G. had been vomiting and "progressively had gotten weaker." *Id*. at 35. The medical staff attempted to resuscitate T.G. and removed her clothing. They were "alarmed" to find "a gross amount of blood in her diaper[.]" *Id*. at 34. After approximately eleven minutes, the attending physician declared T.G. dead. The medical staff examined T.G.'s body and noticed bruises on her face above

her right eye and on the right side of her chest, as well as a larger bruise on her lower left abdomen that appeared to have been covered with makeup.

When a nurse asked Strong about the events leading to T.G.'s death, he replied that she had not been feeling well, and he had given her crackers to eat. He stated that T.G. vomited on herself twice, that he had given her two baths, and that T.G. was unable to stand after the second bath. When asked about what might have caused the bruises and the blood, Strong admitted that "he may have stepped on her during the night" a week or two earlier. *Id*. at 61. The hospital staff was suspicious of T.G.'s injuries and called the police and child protective services. Police searched Strong's parents' basement and found three blood-stained diapers, a blood stain and hair on the carpet, two blood-stained sleeping bags, a blood-stained comforter, blood-stained baby wipes, and a makeup kit. Police also recovered T.G.'s blood-stained diaper and dress from the hospital. DNA testing established that the blood on the items came from T.G.

On the evening of July 13, police interviewed Strong at the stationhouse. A detective typed up a statement, which Strong reviewed, initialed, and signed. According to the statement, T.G. was complaining of a stomachache when Strong came home at 6:10 a.m. He fed her animal crackers and changed her diaper, which had a "mixture of poop and blood[.]" State's Ex. 45.[2] Strong, T.G., and I.G. went to sleep around 7:30 a.m. Half an hour later, Strong heard a "hiccupping noise" and saw that T.G. had vomited on herself. *Id*. He gave her a bath upstairs, took her back downstairs, gave her some milk, and went to sleep. At 1:30

[2] Strong initially told police that he had discovered blood in T.G.'s diaper at 1:30 p.m. Tr. vol. II at 137.

p.m., T.G.'s crying awakened Strong. Strong "was upset because she woke [him] up" and told her to stop crying. *Id*. When she did not do so, Strong "got up over" T.G., "grabbed her face with both hands and told her to stop crying." *Id*. Strong's "knee went into her abdomen[,]" and "[m]ost of [his] weight was on her abdomen." *Id*. He "didn't mean to put [his] knee there, but [he] didn't move it." *Id*. T.G. stopped crying, and Strong noticed "a couple spots of blood on the sheets." *Id*. Strong again changed T.G.'s diaper, which again had "a mixture of blood and poop[,]" and went back to sleep. *Id*. At 2:10 p.m., T.G. "began to fuss again[,]" and Strong "told her to stand up." *Id*. T.G. collapsed. Strong took her upstairs to show Karolyn, where she collapsed and hit her head on a bed frame. Strong then called James's place of employment and drove T.G. there.

On July 14, 2004, a pathologist performed an autopsy on T.G. The pathologist found bruises and abrasions on her right ear, both arms, and back. The pathologist also found "a relatively large bruise" on her lower left abdomen that appeared to be covered with makeup. Tr. vol. III at 135. On the back of T.G.'s head was an area that had "the classic appearance" of hair having "forcibly been pulled out of the scalp." *Id*. at 127. T.G.'s abdominal cavity was filled with blood, and a seven-centimeter-long segment of the small intestine was "totally torn away from the small intestine." *Id*. at 145. The pathologist found two tears in the mesentery[3] supporting the small intestine. According to the pathologist, these injuries occurred "recently prior to death[,]" given the amount of blood, the condition of the intestine,

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[3] *See* BLAKISTON'S GOULD MEDICAL DICTIONARY 828 (4th ed. 1979) (defining "mesentery" as "1. Any of the peritoneal folds attaching certain organs, especially the intestine, to the abdominal wall. 2. Specifically, that which attaches the small intestine to the posterior abdominal wall.").

and the lack of inflammation and infection. *Id*. at 148.[4] The injuries must have been caused by "a significant amount of force[,]" greater than "normal bumps or falls[.]" *Id*. at 150.[5] The pathologist determined that T.G.'s death was caused by "blunt force injuries of the abdomen." *Id* at 155. In his opinion, an adult placing a knee on T.G.'s abdomen was an "absolutely adequate explanation" of the tear in her small intestine. *Id*. at 157.

The State initially charged Strong with class A felony battery and class A felony neglect of a dependent and later charged him with murder.[6] On November 9, 2005, a jury found Strong guilty as charged. At sentencing, the trial court merged the battery and murder convictions on double jeopardy grounds and sentenced Strong to consecutive terms of sixty-five years for murder and fifty years for neglect of a dependent. Strong now appeals.

Discussion and Decision

I. Prosecutorial Misconduct

[4] The pathologist also found evidence of a prior injury to T.G.'s intestines that was in the process of healing. Tr. vol. III at 151.

[5] The pathologist stated, "I've seen injuries similar to this when there have been punches thrown by an adult into a child. I have seen injuries similar to this in severe motor vehicle collisions with an unrestrained child. I have seen injuries similar to this with the tearing of the intestines and the bruising and the mesenteric lacerations in terrible, accidental traumas such as a heavy weight rolling over a child and tearing the intestines. So relatively significant force." Tr. vol. III at 158.

[6] The State also filed a count of neglect of a dependent resulting in serious bodily injury as to I.G. This count was later severed and ultimately dismissed in exchange for allowing the trial court to determine aggravating circumstances at sentencing.

Strong takes issue with the following three exchanges that occurred during the State's direct examination of Dusty James, who had been charged with and convicted of neglect of a dependent resulting in death:

> Q And with regard to the charge of Neglect of a Dependent, were you accused of having placed your children - - your child, [T.G.], in a situation of danger to her life or health by placing her in the care of Chad Strong?
>
> A Yes.
>
> Q And was that because you had knowledge of Chad Strong having abused [T.G.] - -
>
> A Yes.
>
> Q - - in the past?
>
> A Yes.

Tr. vol. III at 34. Strong did not object to this exchange.

Shortly thereafter, the following exchange occurred:

> Q And you had indicated previously that that was based upon your knowledge of things that Chad had done to your daughter and you still put him in her care [sic]. Is that right?
>
> A Yes.
>
> Q Have you ever witnessed Chad Strong physically abuse your daughter?
>
> A Yes.
>
> Q On what occasion?
>
> A A couple of occasions.
>
> Q And what did you observe?
>
> A He had kicked her in the leg.

Id. at 57. Strong objected on relevance and prejudice grounds. The trial court sustained Strong's objection but added that "this evidence could be admissible over an objection to prove that the injuries were inflicted knowingly as opposed to accidentally.… I don't know that [Strong's counsel] has raised the defense on the record at this point; and, therefore, my ruling stands." *Id*. at 59-60.

The State then continued to question James:

> Q Nevertheless you are facing years in prison as a result of the offense you have acknowledged your involvement in. Is that right?
>
> A Yes.
>
> Q And that's basically leaving your child, [T.G.], in the care of Chad Strong?
>
> A Yes.

Id. at 60. Strong did not object to this third and final exchange.

On appeal, Strong claims that the prosecutor committed misconduct and characterizes these exchanges as "evidentiary harpoons" placed "before the jury with the deliberate purpose of prejudicing the jurors against the defendant." Appellant's Br. at 11. We first observe that Strong objected only to the second exchange between the prosecutor and James, which was largely cumulative of the first. Any error in the admission of evidence that is cumulative of other evidence admitted without objection does not constitute reversible error. *Pinkins v. State*, 799 N.E.2d 1079, 1088 (Ind. Ct. App. 2003), *trans. denied* (2004). Moreover, "a defendant waives appellate review of the issue of prosecutorial misconduct when he fails to immediately object, request an admonishment, and then move for mistrial."

Reynolds v. State, 797 N.E.2d 864, 868 (Ind. Ct. App. 2003). Strong failed to do so here and has therefore waived review of this issue.

Waiver notwithstanding, we note that to prevail on an "evidentiary harpoon" claim, "the defendant must show that (1) the prosecution acted deliberately to prejudice the jury, and (2) the evidence was inadmissible." *Alvies v. State*, 795 N.E.2d 493, 504 (Ind. Ct. App. 2003), *trans. denied*. There is little doubt that the prosecutor acted deliberately to prejudice the jury with references to Strong's prior bad acts that were inadmissible because Strong had not yet alleged a contrary intent, as the trial court correctly observed. *See* Ind. Evidence 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, *intent*, preparation, plan, knowledge, identity, or *absence of mistake or accident*, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial … of the general nature of any such evidence it intends to introduce at trial."[7]) (emphases added); *Wickizer v. State*, 626 N.E.2d 795, 799 (Ind. 1993) ("When a defendant alleges in trial a particular contrary intent, whether in opening statement, by cross-examination of the State's witnesses, or by presentation of his own case-in-chief, the State may respond by offering evidence of prior crimes, wrongs, or acts to the extent genuinely relevant to prove the defendant's intent at the time of the charged offense."). That said, Strong later claimed that he kneeled on T.G.'s abdomen accidentally, which would have opened the door to evidence regarding his prior bad acts. *See* Tr. vol. III at 196; *Wickizer*, 626 N.E.2d at 799. This fact, as well as the

overwhelming independent evidence of Strong's guilt, mitigates the prejudicial impact of the evidentiary harpoons such that they can only be considered harmless in this case. *See Hernandez v. State*, 785 N.E.2d 294, 300 (Ind. Ct. App. 2003) ("The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction."), *trans. denied*.

II. Admission of Autopsy Photos

Next, Strong challenges the trial court's admission of State's Exhibits 65 through 67, three photographs depicting T.G.'s autopsy. Our standard of review is well settled:

> Because the admission and exclusion of evidence falls within the sound discretion of the trial court, we review the admission of photographic evidence only for an abuse of discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the court. Relevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. Ind. Evidence Rule 403. Photographs, even those gruesome in nature, are admissible if they act as demonstrative aids for the jury and have strong probative value.
>
> Autopsy photographs often present a unique problem because the pathologist has manipulated the corpse in some way during the autopsy. When a body is altered for a photograph, the concern is that the handiwork of the pathologist may be imputed to the defendant, thereby rendering the defendant responsible in the minds of the jurors for the cuts, incisions, and indignity of an autopsy. As such, autopsy photographs are generally inadmissible if they show the body in an altered condition. However, there are situations where some alteration of the body is necessary to demonstrate the testimony being given.

Ketcham v. State, 780 N.E.2d 1171, 1178-79 (Ind. Ct. App. 2003) (brackets, quotation marks, and some citations omitted), *trans. denied*.

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[7] The State observes that it provided such notice before trial. *See* Appellant's App. at 54-55.

At trial, Strong conceded that the challenged photographs were relevant but claimed that they were overly prejudicial. Tr. vol. III at 142, 154. Strong makes the same argument on appeal, claiming that the photographs are "gruesome" and that the conditions "they depict could have been described by the witness without a picture." Appellant's Br. at 15. As the State points out, however, the photographs effectively demonstrate the internal injuries described by the pathologist: namely, the blood in T.G.'s abdominal cavity, the detached portion of the small intestine, and the lacerations to the mesentery. The State further observes that "[t]hese injuries are particularly important to the State's case because they caused [T.G.'s] death and it is not clear that internal injuries are even related to the evidence of external injuries which had already been presented to the jury." Appellee's Br. at 12; *see* Tr. vol. III at 147 (pathologist stating that "because there is no continuity necessarily between what's above and what's below, it's often impossible to say, well, whatever caused this bruise on the outside also caused this on the inside."). Given the strong probative and demonstrative value of the photographs depicting the internal injuries that caused T.G.'s death, we cannot say that the trial court abused its discretion in admitting them.

III. Double Jeopardy

Finally, Strong contends that his convictions for murder and neglect of a dependent resulting in death violate the double jeopardy clause of the Indiana Constitution. *See* IND. CONST. art. 1, § 14 ("No person shall be put in jeopardy twice for the same offense."). The State effectively concedes this point, and we agree. As Justice Sullivan explained in his concurring opinion in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999),

> The legislature has provided that the punishment classification of certain crimes may be enhanced if the behavior which constitutes the crime is accompanied by certain specified additional behavior or causes certain specified additional harm. In situations where a defendant has been convicted of one crime for engaging in the specified additional behavior or causing the specified additional harm, that behavior or harm cannot also be used as an enhancement of a separate crime; either the enhancement or the separate crime is vacated. Recent examples include *Kingery v. State*, 659 N.E.2d 490, 496 (Ind. 1995), and *Moore v. State*, 652 N.E.2d 53, 60 (Ind. 1995), both reducing a Class A enhancement to a robbery conviction because the very same killing that was the basis of the enhancement was also the basis of a murder conviction.

Id. at 56 (Sullivan, J., concurring) (footnote omitted).

Here, Strong was convicted of murder for his knowing[8] killing of T.G. *See* Ind. Code § 35-42-1-1(1) (murder); Appellant's App. at 23A (amended charging information). He was also convicted of class A felony neglect of a dependent for his placement of T.G., who was less than fourteen years of age, in a situation that endangered her life or health *and* that resulted in her death. *See* Ind. Code § 35-46-1-4(b)(3) (neglect of a dependent resulting in death); Appellant's App. at 14A (original charging information).[9] T.G.'s death, which was the harm caused by Strong's murder, was used to enhance the neglect of a dependent conviction to a class A felony. Under Indiana's double jeopardy standard, Strong cannot be convicted twice for the same death.

We confronted a similar situation in *Sanders v. State*, 734 N.E.2d 646 (Ind. Ct. App. 2000), *trans. denied*:

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[8] "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b).

[9] Specifically, the State alleged that Strong had committed class A felony neglect of a dependent by "allowing [T.G.] to languish and suffer without medical treatment knowing she had been gravely injured, all of which resulted in the death of [T.G.] …." Appellant's App. at 14A.

> When two convictions are found to contravene double jeopardy principles, a reviewing court may remedy the violation by reducing either conviction to a less serious form of the same offense if doing so will eliminate the violation. In the alternative, a reviewing court may vacate one of the convictions to eliminate a double jeopardy violation. In making that determination, we must be mindful of the penal consequences that the trial court found appropriate.

Id. at 652 (citations omitted).

Here, the trial court characterized Strong's case as "appalling" and gave a detailed sentencing statement supporting its rationale for imposing enhanced and consecutive sentences for murder and a class A felony. Sentencing Tr. at 20-26. The State points out that

> [t]he murder and neglect convictions were based on two completely different sets of actions as the murder happened when [Strong] placed his knee into [T.G.'s] abdomen and the neglect happened thereafter when he did not seek medical attention. Thus, this is not a situation where the neglect offense constitutes the very same act as the murder offense.

Appellee's Br. at 14 (distinguishing *Strong v. State*, 538 N.E.2d 924, 929 (Ind. 1989) (vacating class B felony neglect conviction where both neglect conviction and murder conviction were apparently based on defendant's hitting victim and striking his head against bathtub)). The State asks that we reduce Strong's neglect of a dependent conviction to a class B felony "based on the serious bodily injury that resulted from [Strong's] failure to seek timely medical attention." Appellee's Br. at 14; *see* Ind. Code § 35-46-1-4(b)(2) (neglect of a dependent resulting in serious bodily injury); Ind. Code § 35-41-1-25 (defining "serious bodily injury" in pertinent part as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; or (4) permanent or protracted loss or impairment of the function of a bodily member or organ").

We conclude that the State's requested relief is proper in this case. At the very least, Strong's failure to obtain prompt medical treatment for T.G. resulted in bodily injury that created a substantial risk of death and caused her to become unconscious and suffer extreme pain, as evidenced by her blood-filled abdominal cavity and bloody diapers. Mindful that the trial court found significant penal consequences to be appropriate here, we remand with instructions to reduce Strong's class A felony neglect conviction to a class B felony and impose a sentence of twenty years on that count, to be served consecutive to his sixty-five-year sentence for murder. *See Pierce v. State*, 761 N.E.2d 826, 830 (Ind. 2002) (remanding with instructions to reduce class B felony burglary conviction to class C felony on double jeopardy grounds and to impose specific sentence thereon). Pursuant to Indiana Appellate Rule 7(B), we find an eighty-five-year sentence to be appropriate in light of the nature of the offenses and Strong's character.[10]

Affirmed in part and remanded.

BAKER, J., and VAIDIK, J., concur.

[10] Given our resentencing on the neglect count, we need not address Strong's argument that his original one-hundred-fifteen-year sentence is inappropriate.